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No. 80-1082

IN THE

Supreme Court of the United States

October Term, 1981

HAROLD J. SMITH, Superintendent,
Attica Correctional Facility,

Petitioner,

—against—

WILLIAM R. PHILLIPS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF AND APPENDIX FOR RESPONDENT

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Questions Presented

In a state criminal trial for double murder and related crimes, a juror, one John Dana Smith, therein, applied to the prosecutor for an investigative position shortly after he was sworn. During the trial, Smith's friends inquired about the status of his application and, in the process, informed the prosecutor's office that he was sitting on respondent's jury. When the trial assistants learned of the pending application, one week before respondent's conviction, they directed that no one in their office contact Smith and decided not to inform either the court or the defense about the situation. The day after the verdicts, Smith, who had heard nothing from the prosecutor's office since the filing of his application, attempted unsuccessfully to ascertain its status from one Joan Sudolnik, the Assistant District Attorney responsible for reviewing it, and then asked a former employer to intervene for him. The latter telephoned Ms. Sudolnik and, among other things, informed her that Smith had been a juror at respondent's trial. Ms. Sudolnik replied that Smith would be interviewed for the position, along with other applicants, but that the final decision would be made by another city agency. On December 9, 1974, five days after learning of the above facts, the District Attorney finally informed the trial judge thereof.

1. Is a person in Smith's position, although found not to be actually biased by the trial court, conclusively presumed to be impliedly biased and, therefore, disqualified as a trial juror?

   The United States District Court for the Southern District of New York answered this question in the affirmative.

2. Is the failure of the prosecutor to inform the trial court and the defense of the juror's application and the history thereof in time for the latter's re-

placement by an available alternate such a violation of due process as to require a new trial?

The District Court did not reach this question, but the United States Court of Appeals for the Second Circuit answered it in the affirmative.

3. Is the failure of the prosecutor to inform the trial court and the defense of the juror's application and the history thereof prior to the commencement of jury deliberation such egregious prosecutorial misconduct as to require a new trial, irrespective of demonstrable prejudice to respondent?

Neither the Circuit not the District Court reached this question.

Parties to the Proceedings

The parties to the proceeding are as follows:

1. Harold J. Smith, Superintendent Attica Correctional Facility, is the nominal petitioner.
2. William R. Phillips, a former inmate at said Attica Correctional Facility, is the respondent.

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Preliminary Statement

This brief is submitted in response to that of Petitioner. Respondent's time in which to file and serve this Brief was extended by the Clerk of this Court from June 21, 1981, to August 3, 1981, by letter dated June 16, 1981.

Opinions Below

The opinion of the Court of Appeals for the Second Circuit affirming the grant of habeas corpus (App. A, 1a-12a)* is reported at 632 F.2d 1019 (1980). The opinion of the United States District Court for the Southern District of New York granting the writ of habeas corpus (App. B, 13a-29a) is reported at 485 F. Supp. 1365 (1980). The opinion of the state trial judge denying the motion to set aside the conviction (App. E, 33a-57a) is reported at 87 Misc. 2d 613, 384 N.Y.S.2d 906 (1975). The order of the Appellate Division, First Department, affirming the judgment of conviction without opinion is reported at 52 A.D.2d 758, 384 N.Y.S.2d 715 (1976). Finally, the order of former Chief Judge Charles Breitel denying leave to appeal to the New York Court of Appeals is reported at 39 N.Y.2d, 949, 386 N.Y.S.2d 1039 (1976).

Jurisdiction

The judgment of the Court of Appeals was entered on September 26, 1980 (App. F, 58a-59a). Rehearing was

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* The parties have agreed that Appendices A through G to the petition for certiorari should constitute the Joint Appendix, and on April 20, 1981, the Court granted the State's motion to dispense with printing the appendix. References, therefore, are to the appendices to the petition for certiorari except as to Respondent's Appendices H through M which are appended hereto. All references to any appendices shall be indicated by its letter, followed by the appropriate pagination.

denied on December 8, 1980, (App. G, 60a-61a), and it was noted that no judge in regular active service nor on the panel which heard the appeal had requested that a vote be taken on petitioner's suggestion for rehearing *en banc. Id.* The petition for a writ of certiorari was filed on January 1, 1981, and this Court granted said petition on February 23, 1981. The jurisdiction of this Court was invoked by petitioner under 28 U.S.C. § 1254(1).

Constitutional and Statutory Provisions Involved

The constitutional and statutory provisions involved in addition to those contained in the Appendix to Petitioner's Brief, are set forth in Appendix H hereto.

Counter-Statement Of The Case

While respondent has no fault to find, in general, with Petitioner's Statement of the Case, there are several omissions or misstatements which deserve mention. For example, petitioner points out on Page 3 of his Brief that Respondent's first trial ended in a hung jury without revealing that the panel had been deadlocked 10-2 for acquittal. See Appendices I and J hereto. It might also be pointed out that the "recognition" of respondent when he appeared as a cooperating witness at the televised hearings into police corruption conducted by the New York City Knapp Commission in 1971 by John Justy, a city detective assigned to investigate the crimes here involved, Petitioner's Brief at 3, was, not only by its fortuitious nature, suspect,* but evidence at the trial certainly augmented that impression. Detective Justy claimed that, when he saw Respondent on television, he "realized that [Respondent] resembled the composite

* It might be noted that respondent's indictment and eventual conviction aborted a substantial number of state and federal indictments which resulted or would have resulted from his testimony. App. K at 7a.

sketch of the killer which had been obtained from the eye witnesses." Petitioner's Brief at 3. Yet when the only survivor of the shootings testified, he admitted that he had misidentified Respondent, and that he had never been shown the composite sketch in question until December 14, 1971. Trial Transcript at 654, 668.

However, it serves no useful purpose to go through petitioner's factual presentation and point out each and every inaccuracy or misstatement. The essential facts, as set forth by the District Court, and which are not in significant dispute, are as follows:

1. On September 23, 1974, the day he was selected and sworn as a juror in respondent's trial, Mr. Smith learned from one Rudy Fontaine, a Criminal Court officer, that there were job opportunities for people with investigative backgrounds in the Major Felony Program of the New York County District Attorney's Office. App. A, at 16a.

2. After Mr. Smith had expressed interest in such a position, Officer Fontaine then inquired of a friend, an investigator in the District Attorney's Office, as to the proper procedures for applying therefor. *Id.*

3. Although the record is inconclusive as to whether Officer Fontaine mentioned Juror Smith's name to anyone in the District Attorney's Office, he did furnish the information as to the proper procedures to Mr. Smith. *Id.*

4. Officer Fontaine also spoke to one Mario Piazza, a jury warden for the New York State Supreme Court, to inquire as to where such employment applications should be submitted. *Id.*

5. Warden Piazza then spoke to John Lang, an Assistant District Attorney, and was informed that applications should be sent to the District Attor-

ney's Office. *Ibid.*, 16a-17. Although Piazza did not mention Smith's name, he met the latter, while petitioner's trial was in progress, at a lunch which was also attended by Officer Fontaine. *Ibid.*, at 17a.

6. On or about October 22, 1974, Smith drafted an application letter and resume, pursuant to instructions received from Officer Fontaine, which was then hand-delivered by the latter to the District Attorney's Office, together with his own application. *Id.*

7. When the District Attorney's Office refused to accept Smith's hand-delivered application, Officer Fontaine, following the said office's instructions, then stamped and mailed the juror's application, addressed to then District Attorney Richard Kuh. *Ibid.*, at 17a-18.

8. Smith's application and resume were received by the District Attorney's Office on October 23, 1974. *Ibid.*, at 18a.

9. Several days later, after a meeting between Juror Smith, Officer Fontaine, and Warden Piazza, the latter informed Fontaine (and, presumably, Smith) that the juror's application had been submitted. *Id.*

10. Shortly afterward, Warden Piazza notified Officer Fontaine that Assistant District Attorney Joan Sudolnik was responsible for reviewing Smith's application and that the juror should call her.

11. Officer Fontaine apparently relayed this information to Juror Smith. *Id.*

12. Later, while petitioner's trial was still in progress, Officer Fontaine informally inquired as to the status of Juror Smith's application, informing an Assistant District Attorney Holmes that Smith was a juror at respondent's trial. *Id.*

13. In addition Warden Piazza also inquired on several occasions of Assistant District Attorneys Holmes and Lang about the position in quesiton and, according to Holmes, mentioned Smith's name in connection therewith. *Ibid.*, at 19a. Holmes apparently told Piazza that Smith's application could not be processed because he was on respondent's jury and advised him to have no contact with the juror. *Ibid.*, at 19a.

14. Shortly thereafter, Holmes notified Assistant District Attorney Sudolnik about the juror's application and that he was on respondent's jury. *Id.*

15. On or about November 14, 1974, one week before respondent's conviction, the trial prosecutors, Jack Litman and Philip La Penta, were informed of the situation and orders were apparently issued to assure them that Smith would not be contacted by anyone in the District Attorney's Office. *Id.*

16. After conferring together, Messrs. Litman and La Penta decided not to inform either the court or defense counsel about the Smith situation.

17. Respondent's jury retired to deliberate on November 20, 1974, and returned its guilty verdicts the next day. *Id.*

18. At no time prior to the aforesaid verdicts was Smith ever informed as to the status of his employment application. The day after the jury's verdicts he tried to contact Assistant District Attorney Sudolnik about his said application. *Id.*

19. Failing to reach her, he asked one Wallace Reilly, a former supervisor, to inquire at the District Attorney's Office as to the status of his application. *Ibid.*, at 20a-21a.

20. Reilly then called Sudolnik and, among other things, informed her that Smith had been a juror at respondent's trial. She replied that Smith

would be interviewed for the position, along with other applicants and that the final decision would then be made by the New York City Bureau of Personnel rather than the District Attorney's Office.

21. On December 9, 1974, District Attorney Kuh informed the court of the Smith application and some of the approaches to his personnel on the juror's behalf. *Id.*

Summary of Argument

Respondent's first trial for a double murder and an attempted murder ended in a mistrial because the jury reported itself hopelessly deadlocked, reportedly 10-2 for acquittal. At his second trial, which lasted nine weeks and involved forty-four witnesses, he was convicted of all the crimes of which he was accused by an all-male jury which had deliberated almost eleven hours over a two-day period. Eighteen days after the rendition of the above verdicts, the prosecutor revealed, for the first time, to the trial judge that, shortly after being sworn, one John Dana Smith, Juror No. 3, had applied to his office for an investigative position, caused inquiry to be made of his application's status during the course of the trial, and, the day following the verdicts, had called and caused to be called the Assistant District Attorney responsible for reviewing his application, to determine its status. At no time during this period, was the juror given any inkling by the prosecutor's office that his application was not under active and serious consideration by it.

It is respondent's contention that any juror in Mr. Smith's situation was, as the District Court held, "[N]ot qualified to sit as a juror because of implied bias and should have been removed from the panel of jurors." App. B at 29a. Such an "inexcusable abridgement of

the [respondent's] Sixth Amendment right," *id.*, cannot be cured or neutralized by a post-conviction hearing in which the sole probative evidence as to the juror's state of mind consisted of his vehement and self-conscious denials of any bias in favor of the prosecutor. See Petitioner's Brief at pp. 12-13.

Throughout all recorded Anglo-American jurisprudence, jurors in Smith's position have been held to be disqualified as a matter of law. The reason, as pointed out by the court below, is that "[G]iven the human propensity, often subconscious, for self-justification, as well as the 'psychological impact' of requiring an individual to state before others whether he was fair and impartial . . . it is at best difficult and perhaps impossible to learn from a juror's own testimony after the verdict whether he was in fact impartial." App. A, at 7a.

Moreover, the inclusion of such a juror on respondent's jury, with the prosecution's knowledge and concealment thereof, is a gross violation of the 'appearance of justice' standard. It does not require a great deal of imagination to gauge accurately both the lay and professional reaction to the presence of a person in Smith's position on a jury in what petitioner himself characterizes as a "most significant state prosecution . . ." Petitioner's Brief at 19. If the 'appearance of justice' standard has any vitality whatsoever, this is a most classic case for its application.

Lastly, the deplorable conduct of the prosecutor in not making timely disclosure of Juror Smith's job application, while doing so in the case of another juror in a far less compromising position, calls for "the objective, prophylactic role," App. A at 7a, adopted by the District Court. Such prosecutorial misconduct, which was the catalyst for the necessarily ineffectual Remmer-type hearing conducted by the state trial judge, will continue to reign unchecked, as prophecized by former Chief Judge Swygert in his dissenting opinion in *United States* v.

Falk, 605 F.2d 1005, 1016 (7th Cir. 1979), unless the highest tribunal in the land asserts the constitutional impropriety of such malfeasance and takes firm and unequivocal action to deter or inhibit repetition.

ARGUMENT

I

Juror Smith's Application, Immediately Following His Selection, For A Position With The Prosecutor, Created An Irrebutable And Conclusive Presumption Of Bias.

A. Any Juror In Mr. Smith's Position Must Be Considered Impliedly Biased.

The fundamental issue raised by these proceedings is whether any trial juror, who immediately after his/her selection, applies to the prosecutor for a position, can ever be considered a fair juror, despite his/her post-trial protestations of impartiality, and the trial judge's acceptance, after an evidentiary hearing, of the claimed freedom from bias. It is respondent's contention that, given the within record, it is impossible as a matter of law, for such a juror to be impartial, and that the trial judge's finding of non-bias flies in the face of all logic, psychology and human experience. As the Second Circuit majority opinion put it:

> Given the human propensity, often subconscious, for self-justification, as well as the "psychological impact" of requiring an individual to state before others whether he was fair and impartial, *Irvin* v. *Dowd*, 366 U.S. 717, 728 (1961), it is at best difficult and perhaps impossible to learn from a juror's own testimony after the verdict whether he was in fact "impartial." Indeed, following a

> seven week trial any determination of something as amorphous as the feelings of a juror who has applied to the prosecutor for a job may be suspect. App. A at 7a.

In the instant case, it would be virtually impossible to expect that any juror, in Mr. Smith's position, could possibly admit, if such were the case, that he had indeed been influenced by his pending job application. Such an admission would quite obviously subject him to severe sanctions, either through criminal prosecution or the contempt process, as well as destroy any chances he may ever have had to secure the employment he so assiduously sought as well as future such employment with other law enforcement agencies. Under such circumstances, to expect that any evidentiary hearing, no matter how conscientiously and thoroughly conducted, could possibly produce anything more than, as here, impassioned denials of bias or partiality, would be to belie or ignore all the lessons of human frailty.

Only recently, the Indiana Supreme Court, in *Haak* v. *State*, — Ind. —, 417 N.E. 2d 321 (S. Ct. Ind. 1981), held that a woman, whose husband was offered a position on the prosecutor's staff on the day that she was selected as a juror in a rape case, was impliedly biased. As that court put it:

> The juror's bias here could not be avoided or dissolved by admonitions from the court or by the juror's assertion that she believed she could judge this case impartially. To expect a juror in this situation to act with an even hand toward both parties, when she knows her spouse is soon to become an advocate for one of those parties, is to ignore human nature. In spite of his or her most sincere efforts to become or remain impartial, the juror in this situation would unquestionably be subjected to extraneous pressures; it is precisely

> these pressures and the unreasonable risks of these pressures which must be avoided in safeguarding the accused's right to an impartial jury, U.S. Const. amend VI; Ind. Const. art. 1, § 13. See *People* v. *Branch*, (1979) 40 N.Y.2d 645, 651, 415 N.Y.S.2d 985, 987, 389 N.E.2d 467, 469 ("[T]he risk of prejudice arising out of the close relationship between the prospective juror and one of the key participants in the trial was so great that recital of an oath of impartiality could not convincingly dispel the taint."). 417 N.E.2d ct 326

See also, *Block* v. *State*, 100 Ind. 357 (1885) [Juror a deputy prosecutor] and *Barnes* v. *State*, 263 Ind. 320, 330 N.E. [Juror's relative a member of the prosecutor's staff]. 2d 743 (1975).

The *Haak* court went on to emphasize that "[W]ithout question, one improper juror destroys the integrity of a verdict." *Ibid.* at 327. The result in *Haak* could not, rationally, have been any different had the application of the juror's husband been pending, rather than acted upon, at the time of her selection. Parenthetically, in *Haak*, the juror in question knew only that her husband had applied for a position in the prosecutor's office and had no knowledge that he had, in fact, been offered and accepted one. 417 N.E.2d at 323.*

The facts of this case are demonstrably different from those presented in such cases as *Dennis* v. *United States*, 339 U.S. 162 (1950), *reh. den.*, 339 U.S. 950 (1950), in

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* In fact, it was agreed between the prosecutor and the juror's husband that, because she was serving on Haak's jury, her spouse "would not actually begin working for [the prosecutor's] office until Haak's trial was concluded, and that they would not inform [her] of this arrangement until after the conclusion of Haak's trial." *Id.*

which this Court held that employees of the Federal Government could not be disqualified from serving on a jury in a prosecution against the General Secretary of the Communist Party, U.S.A., for his allegedly wilful failure to respond to a subpoena issued by the former House Committee on Un-American Activities. Cf. *Crawford* v. *United States*, 212 U.S. 183 (1980). In *Dennis*, the majority opinion, authored by Mr. Justice Minton, emphasized that mere employment by the Federal Government, by virtue of 49 Stat. 682, D.C. Code § 11-1420 (1940), a jury eligibility act passed after this Court's decision in *Crawford*, *supra*, holding that the bias of government employees "would be implied as a matter of law," 339 U.S. at 166, would not give rise to a challenge for cause. As the majority put it: "A holding of implied bias to disqualify jurors because of their relationship with the Government is no longer permissible." *Ibid.* at 171.* See also *Frazier* v. *United States*, 335 U.S. 497 (1949), and *United States* v. *Wood*, 229 U.S. 123 (1936).

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* It must be noted that this Court grounded its decision on the provisions of the aforesaid new jury eligibility act enacted in the District of Columbia after *Crawford*. However, Mr. Justice Peckam's opinion in that case is just as applicable today to the facts and circumstances of this case as it was when drafted some 73 years ago. As he put it:

> [J]urors must at least have the qualifications mentioned in § 215, but that section does not, on our opinion, so far alter the common law upon the subject as to exclude its rule that one is not a competent juror in a case if his master, servant, steward, counselor, or attorney of either party. In such a case a juror may be challenged for principal cause as an absolute disqualification of the juror. 3 Cooley's Bl. Com. 4th ed. p. 363; *Block* v. *State*, 100 Ind. 357, 362. In the Indiana case, Judge Niblack, speaking for the supreme court of that state, held in substance in accordance with the above rule of the common law, and that the Indiana statute upon the qualifications of jurors did not strike out the rule of the common law on the subject, when not inconsistent with the statute. This rule applies as

[Footnote continued on following page]

However, it can hardly be questioned that, had any of the prospective jurors in *Dennis*, *Frazier* or *Wood* been members of the prosecutor's staff, disqualification would have been in order. While those cases do not indicate the nature of the employment of all of the challenged jurors, it is counsel's assumption that none worked for the prosecutors in question or had applied for such employment. While counsel agree with the *Wood* Court that "[I]mpartiality is not a state of mind," 299 U.S. at 145-146, under the circumstances of this case, there is no probative method to ascertain its presence or absence. Here, we are not dealing with the "vague conjecture" that government employees in general are "peculiarly

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well to criminal as to civil cases. Mr. Chief Justice Shepard, in his dissenting opinion in this case, cites many cases to the effect that a clerk or employee of a private party or of a corporation is not qualified to sit as a juror in such a case, over the objection of the opposite side. Although the cases cited were civil cases and rest mainly on the common law, they are not lessened in weight on that account. On the contrary, they apply with added weight to criminal cases. Modern methods of doing business and modern complications resulting therefrom have not wrought any change in human nature itself, and therefore have not lessened or altered the general tendency among men, recognized by the common law, to look somewhat more favorably, though perhaps frequently unconsciously, upon the side of the person or corporation that employs them, rather than upon the other side. Bias or prejudice is such an elusive condition of the mind that it is most difficult, if not impossible, to always recognize its existence, and it might exist in the mind of one (on account of his relations with one of the parties) who was quite positive that he had no bias, and said that he was perfectly able to decide the question wholly uninfluenced by anything but the evidence. The law therefore most wisely says that, with regard to some of the relations which may exist between the juror and one of the parties, bias is implied, and evidence of its actual existence need not be given.

212 U.S. at 264-5.

vulnerable" to "a miasma of fear" and are "so intimidated that they cringe before their Government in fear of investigation and loss of employment if they do their duty as jurors," 339 U.S. at 172, rejected by this Court in *Dennis*. Instead, we are concerned, not with a class of prospective jurors and arguably speculative bias toward someone like Dennis, but rather with one single venireman who was, because of his pending application for employment, "peculiarly vulnerable" to bias against respondent.

Some 150 years ago, Chief Justice Marshall, in words particularly appropriate to this proceeding, stated that a person "may declare that he feels no prejudice in the case; and yet the law cautiously incapacitates him from serving on the jury because it suspects prejudice, because in general persons in a similar situation would feel prejudice." *United States* v. *Burr*, 25 Fed. Cas. at p. 50, No. 14692 g. (C.C. Va. 1807). Only a sophist can declare—much less believe—that the juror in this case, anxiously awaiting word of the disposition of his employment application, would not be subject to "a possible temptation . . . not to hold the balance nice, clear, and true between the state and the accused . . ." *Tumey* v. *State of Ohio*, 273 U.S. 520, 532 (1927). Undoubtedly, this case presents the "particular issues or circumstances" exception set forth in both *Wood* and *Frazier*, 339 U.S. at 117.

One example should illustrate the nature of the problem presented by this case. Suppose that all of the jurors at respondent's state trial had submitted applications for employment with the prosecutor shortly after their selection. Could it possibly be said, with any decent respect for the realities of life or Cartesian logic, that such a panel satisfied the requirements of due process? Can it be reasonably denied that these circumstances are "likely to generate bias, consciously or unconsciously," in such

jurors, 339 U.S. at 181 (Mr. Justice Frankfurter's dissenting opinion)? In this case, where only one juror was a job applicant, respondent was just as much entitled to an opportunity for another hung jury as he would have been for an acquittal had all twelve submitted similar employment applications, and pursued them as steadfastly as did Juror Smith.

To hold otherwise is not only to belie the "appearance of justice" standard, so often expounded by this and other federal courts, see *e.g.*, *Offutt* v. *United States*, 348 U.S. 11, 14 (1954); *In re Murchison*, 349 U.S. 133, 136 (1955); *Rapp* v. *Van Dusen*, 350 F.2d 806 (3rd Cir. 1965); and *United States* v. *Brown*, 539 F.2d 467, 469 (5th Cir. 1976), see Point IB *infra*, but to deny as well the "recognition by law of the facts of life." 339 U.S. at 184 (Frankfurter, J., dissenting). The common law, which developed out of the basic realities of human life, understood that, *inter alia*, prospective jurors, related by blood or marriage to one of the parties or financially dependent thereon, were disqualified from jury service.* As Blackstone noted, a prospective juror should not serve when it is shown:

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* "It was the common law rule and it is generally held in the United States that if the relationship of employer and employee, or a general relationship of principal and agent exists between a party and a prospective juror, the juror is subject to a challenge for that cause." *Busch's Law and Tactics in Jury Trials*, Vol. 1, § 112, p. 705. See also Chief Judge Murrah's dissenting opinion in *Casias* v. *United States*, 315 F.2d 614, 620 (10th Cir. 1963), *cert. den.*, 374 U.S. 845 (1963), where he stated that:

> At common law, jurors were challengeable on principle for bias or partiality due to kinship, interest, former jury service in the same cause, or because the prospective juror was a master, servant, counselor, steward or attorney, or of the same society or corporation. See Cooley's Blackstone, Vol. 2, p. 363.

> that [he] is of kin to either party within the ninth degree; that he has been arbitrator on either side; that he has an interest in the cause; that there is an action pending between him and the party; that he has taken money for his verdict; that he has formerly been a juror in the same cause; that he is the party's master, servant, counsellor, steward or attorney, or of the same society or corporation with him.

3 Cooley, Blackstone Commentaries on the Laws of England 363.

Similarly, Bracton states that if the defendant "suspects any of the twelve jurors he may remove him for just cause . . . as where there are deadly enmities between some of them and the indicted man, or there is a greedy desire to get his land, as was said above; if there is ground for suspicion all are to be removed, that the inquiry may proceed free from all doubts." 2 Thorne, Bracton on the Laws and Customs of England 405 (1968). In *United States* v. *Haynes*, 398 F.2d 980, 984 (2d Cir. 1968), *cert. den.*, 393 U.S. 1120 (1969), the Second Circuit forcefully pointed out that "[N]ot only have these common law grounds for causal challenge retained their vitality . . . but to them have been added others from which prejudice or fine may be involved." It is axiomatic that such jurors could hardly be expected to afford a criminal defendant "the right to . . . trial, by an impartial jury," as mandated by the Sixth Amendment.

The fallacy of the argument advanced by petitioner that "[T]he Constitution requires challenges only to jurors who are determined to be actually biased, Petitioner's Brief at 39 *et seq.*, falls apart when one considers a few illustrative examples. Suppose that, following an accused's conviction of murder, it is discovered that one of his jurors (a) was either a close friend or relative of

the victim, a key witness or the prosecutor; or (b) had been provided thereby with the funds necessary to complete his education, start his own business, or pay for his child's needed (and successful) open heart surgery.* At a post-verdict evidentiary hearing, the juror in question testifies that, notwithstanding these circumstances, he had not been influenced by them in any way and had cast his vote for conviction in a wholly unbiased fashion, leading the trial judge to conclude, as a matter of fact, that the juror was not actually biased. It is patent that such a determination simply could not stand in any society which regards the law "as a response to life . . ." 339 U.S. at 182 (Frankfurter, J., dissenting). Or, as put by Mr. Justice Holmes in *Frank* v. *Magnum*, 237 U.S. 309, 345 (1915):

> This is not a matter for polite presumptions; we must look facts in the face. Any judge who has sat with jurors knows that, in spite of forms, they are extremely likely to be impregnated by the environing atmosphere.

In *Tableporter* v. *Urist*, 157 Misc. 347 (Mun. Ct. 1935), a civil case not dissimilar in fact to the instant one, a juror's son applied to the defendant for employment, which was refused. The Court stated, in holding that the juror in question was disqualified:

> The court cannot ignore the undeniable facts that the juror's son sat with the defendant during an afternoon, asked for employment, which he claims was refused, and yet he returned the following morning and again sat with the defendant in a

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* While challenges for cause may be made upon any of these fact patterns, of 270.20, subd. 1(c), New York Criminal Procedure Law (CPL), as well as for the one here present, the assumption must be made that the defendant, as here, had no knowledge of the imagined circumstances until after his conviction, and, therefore, did not assert any causal challenge.

prominent place in the court room where the jury could observe them together. The interrogation that took place after the verdict was in the presence of all the jurors in the case. The other jurors remained silent. None of them was in any way suspected. But we have not yet reached the day of five-sixths verdicts. A jury must still function as a unit. Their deliberations must be guarded against any extraneous influence that might affect the result. In a recent case, the court said:

> Every litigant is entitled to a fair and impartial trial before an unprejudiced and unbiased jury. A party should not be compelled to submit his rights to a tribunal whose honesty and impartiality can be questioned. The triers of the facts should be beyond suspicion. Otherwise the administration of justice will quickly fall into disrepute. (Payne v. Burke, 236 App. Div. 527).

To the same effect is the Matter of Vanderbilt (127 App. Div. 408) where the court also said: "We cannot determine with certainty, nor is it necessary that we should, that the acts complained of did influence the verdict. It is sufficient for reversal if they are likely to do so."

This language was reiterated by the Appellate Division in this department in setting aside a verdict that was questioned after its rendition. Johnson v. Riter-Conley Manufacturing Co. 149 App. Div. 543.

157 Misc. at 348-349.

Had Smith been employed by the District Attorney, the relationship indisputably would be such as to disqualify him during the *voir dire* under CPL 270.20, subd. 1(c), which disqualifies a prospective juror who bears the "relationship to [counsel for the people] of such

nature that it is likely to preclude him from rendering an impartial verdict." In *Tableporter, supra*, the disqualifying factor was the relationship of the father to the son who applied to the defendant for employment, the father being the juror; here it is the juror himself who was the applicant for employment.

With the exception of *State* v. *Haak*, *State* v. *Block*, and *State* v. *Barnes*, *supra*, counsel has been unable to find any other criminal case even remotely resembling the instant one. Even in *Haak*, as previously pointed out, it was not the juror who was seeking or had obtained employment with the prosecutor, but her husband. All of the citations offered by petitioner to support his thesis that there is no such a concept as implied juror bias refer to circumstances irrelevant to those before the Court. See e.g. *Remmer* v. *United States*, 347 U.S. 227 (1954) [FBI agent sent into jury room without defendant's knowledge or consent to investigate rumor that unnamed person had informed juror he could profit by a verdict in defendant's favor]; *United States* v. *Johns*, 615 F.2d 672 (5th Cir. 1980) [alternate juror learned and advised foreman of the murder of an unidentified trial witness]; *United States* v. *Gross*, 614 F.2d 365 (3d Cir. 1980), *cert. den.*, 447 U.S. 925, 100 S.Ct. 3019 (1980) [Some jurors' annoyance at a marshal's expressed romantic interest in one of their number];* *Sullivan* v. *Fogg*, 613 F.2d 465 (2d Cir. 1980) [post-trial revelation that one juror had complained to the prosecutor throughout the trial of harassment by "voices and "vibrations"]; *United States* v. *Bufalino*, 576 F.2d 446 (2d Cir. 1978), *cert. den.*, 429 U.S. 818 (1976) [non-prejudicial spectator

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* On July 13, 1981, the Arkansas Supreme Court affirmed the overturning of a civil judgment in defendant's favor because a woman juror had, during a recess, told a defense witness that she thought he had "pretty blue eyes." *Moody Equipment and Supply Company* v. *Union National Bank*, No. 81-10 (S. Ct. Ark. 7/13/81). App. L at 12a. Significantly, the Arkansas Court found no actual prejudice to the plaintiff. *Ibid.* at 11a-13a.

"contacts" with jurors]; *United States* v. *Wood, supra,* [mere membership by a juror in a law enforcement agency]; *United States* v. *Johnson,* 401 F.2d 746 (2d Cir. 1968) [employment by a prospective juror in a bank different from that allegedly robbed by defendant]; *United States* v. *Brasco,* 516 F.2d 816 (2d Cir. 1975), *cert. den.,* 423 U.S. 860 (1975) [unauthorized juror visits or telephone calls]; or *Mattox* v. *United States,* 146 U.S. 140 (1892) [a bailiff's derogatory comments about a criminal defendant].*

It is submitted that the *sui generis* nature of the communication of the juror to the prosecutor in this case puts the issue of actual bias in the unprovable category. The wholly subjective nature of the inquiry, divorced, as it is, of any probative objective criteria, makes its goal—the determination of the juror's partiality or impartiality—utterly incapable of proof. As earlier stated, it defies all that we have so painfully learned about ourselves over the centuries to claim, as does petitioner, that a juror who submits an employment application to the prosecutor almost as soon as he is sworn, evidences a more than lively interest in its progress throughout the trial, and pursues it vigorously, beginning with the day after the day after the verdicts are rendered, is not impliedly biased. As the District Court put it:

> Accordingly, the Court finds that Juror Smith was not qualified to sit as a juror because of implied bias and should have been removed from the panel of jurors. The assistant district attorneys who prosecuted these serious criminal charges in

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* See also *United States* v. *Haynes,* [previous jury service in other narcotics cases where some of the government witnesses had testified]; *United States* v. *Gersh,* 328 F.2d 460 (2d Cir. 1964), *cert. den.,* 377 U.S. 992 (1964) [anonymous telephone calls to foreman]; and *United States* v. *Lubrano,* 529 F.2d 633 (2d Cir. 1975), *cert. den.,* 429 U.S. 818 (1976) [federal agent obtained coffee for two jurors during a trial recess].

> state court must share the responsibility for this inexcusable abridgement of the petitioner's Sixth Amendment right. They were aware of this problem long before the jury retired to deliberate and failed to bring this matter to the attention of the trial court or defense counsel. Since three alternate jurors were available at the time, this controversy could likely have been avoided by the substitution of another juror for Smith.
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> App. B at 29a.

Counsel is well aware that some courts have pointed out that it is inexpedient, if not well nigh impossible, to attempt "to create a set of unreasonably constricting presumptions that jurors be excused . . . due to certain occupational or other special relationships which might bear directly or indirectly on the circumstances of a given case . . ." *Mikus* v. *United States*, 433 F.2d 719, 724 (2d Cir. 1970).* But the common law standard enunciated by Chief Judge Murrah in *Casias, supra*, or Mr. Justice Black's "average man" test, as set forth in *Dennis, supra*, at 176-77, is not difficult to apply in the various contexts in which implied bias is advanced. Juror Smith was, to echo Blackstone, a prospective "servant" of one party to respondent's criminal prosecution and, under those circumstances, the "average man" must be presumed to

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* For relevant state court cases, see *Locyza* v. *Bklyn and Queens Transit Corp.*, 254 AD 577, 578 (2d Dept. 1938); *Turner* v. *Montgomery Ward & Co.*, 165 S. Car. 253, 258-9, 163 SE 796, 797-98; *Block* v. *State*, 100 Ind. 357 (1885); *People* v. *Provenzano*, 70 AD 2d 960 (3d Dept. 1979), *leave to appeal granted by Judge Jones*, 48 NY 2d 717 (1979), *rev'd* 50 NY 2d 420 (May 29, 1980) and *remanded to App. Div. for further proceedings; People* v. *Harding*, 44 AD 2d 800 (1st Dept. 1974); *People* v. *Cosmos*, 205 NY 91 (1912); *People* v. *Winship*, 309 NY 311 (1955); *People* v. *White*, 22 AD 2d 830 (3rd Dept. 1964); *People* v. *West*, 38 AD 2d 548 (1st Dept. 1971), aff'd 32 NY 2d 944; *People* v. *Cocco*, 305 NY 282 (1953); *People* v. *Kuck*, 43 AD 2d 685 (1st Dept. 1973); and *Matter of Vanderbilt*, 127 AD 408 (2d Dept. 1908).

favor his prospective employer whose goodwill he was actively courting.*

As the record herein abundantly documents, Mr. Smith was busily engaged, during most of respondent's trial, in attempting to become a member of the District Attorney's Major Felony Program. The moment he learned from Criminal Court Officer Fontaine that such employment was possible, he lost no opportunity to advance himself to that end. Not only did he importune Fontaine to ascertain the proper method of applying for such employment, but he followed the latter's instructions to the letter. In fact, once having drafted his application and resume, he gave them to Fontaine in an unstamped envelope for hand delivery to the District Attorney's Office, because he assumed that the court officer had a personal contact therein. Moreover, after the application had reached its destination, he was meeting regularly wtih Fontaine and Jury Warden Piazza in an effort to expedite and facilitate its consideration. No sooner had the trial ended when he contacted the District Attorney to discover the status of his application. When he failed to make contact with the proper person at that office, he asked his former supervisor to do so for him. See App. A at 3a-5a, App. B at 16a-21a.

His selection as a juror in a highly publicized trial came as a golden opportunity for a man about to graduate from college and who planned a career in law enforcement. Prior to respondent's trial, he had already submitted an application for an investigative position with the Drug Enforcement Agency (DEA) of the Depart-

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* While both *United States* v. *Wood*, and *Frazier* v. *United States*, *supra*, hold that proof of mere governmental employment was not enough, standing alone, to impute disqualifying bias in federal criminal proceedings, they clearly indicate that "particular issues or circumstances" might require the exclusion of governmental employees in order to insure an impartial jury.

ment of Justice. App. B, at 16a. Now, his status as a juror in a major trial, with considerable political overtones, would certainly appear to give him an edge over other applicants insofar as the District Attorney was concerned. No one in his position would have to be told that a conviction of respondent would go a lot further toward achieving his heart's desire than an acquittal. His telephone call to Ms. Sudolnik on the day after the verdict is indicative of his sentiments in that regard—he had just delivered and he was striking while the iron was hot.*

Both the trial judge and petitioner made much of the fact that Smith was accepted by the defense in spite of his background in law enforcement and his expressed intention to make a career in that field. See e.g. Petitioner's Brief at 37. Defense counsel, for tactical reasons, apparently thought that such a man would be a suitable juror in a trial involving a police officer as defendant. But it can hardly be said that Smith would have been equally acceptable to the defense if it had been known that he was about to apply for a job with the prosecutor's office. It is one thing to be generally interested in law enforcement, to have held a position as a store detective and to have applied to a federal agency for employment—it is quite another to be seeking a position with the very office prosecuting a criminal defendant. It is pure sophistry to equate the two situations and to claim that Smith was, even with his new application pending with the District Attorney, as desirable to the defense as he may have been during the *voir dire*.**

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* To repeat, "impartiality is not a technical conception. It is a state of mind. For the ascertainment of this mental attitude of appropriate indifference, the Constitution lays down no particular tests and procedure is not chained to any ancient and artificial formula." *United States* v. *Wood*, *supra*, at 145-6.

** At the very least, the defense should have been given the information withheld by the prosecution so that a challenge, if thought desirable, could have been finally made.

Moreover, the trial judge's blanket acceptance of Smith's vehement protestations that his verdict was in no way conditioned upon his hope of employment by the District Attorney simply cannot be accepted at face value. What person, in Smith's position, could possibly have admitted that he had violated his oath as a juror and, in essence, committed a crime? See Appendix H. It would be asking far too much of human nature to expect anyone in Smith's predicament to admit that his job expectations had in any way or manner influenced his vote in a murder trial. This is precisely why Chief Justice Marshall held that "[I]n determining whether a prospective juror should be excluded on this ground [implied bias] his statements upon *voir dire* are totally irrelevant; a person 'may declare that he feels no prejudice in the case; and yet the law cautiously excludes him from serving on the jury because it suspects prejudice, because in general persons in a similar situation would feel prejudice,' *United States* v. *Burr*, 25 Fed. Cas. at 50." *United States* v. *Haynes*, *supra*, at 984.*

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* In this connection, see also *Vermont* v. *Woodard*, 353 A. 2d 321 (1976), in which a juror in a rape case inadvertently overheard the defendant's end of an incriminating telephone conversation during the latter's trial. The juror heard the testimony of two witnesses and then disclosed his overhearing to the trial judge, who excused him at once. In reversing, the Supreme Court of Vermont stated as follows:

> But with juror Abel remaining with the jury, listening to other testimony in the case, and not disclosing to the court until some hours later the information which subsequently constituted his testimony, circumstances existed capable of influencing the deliberate function of the jury. The defendant did not have to show that the circumstances here existing actually did influence the jury. All that had to be shown was that such circumstances could have had the capacity to influence the deliberation and verdict of the jury. In the absence of proof to the effect that the jury was not influenced by the circumstances here, the danger remained that the capacity to do so did exist. The question

[Footnote continued on following page]

In *Manuel* v. *Oklahoma*, 541 P. 2d 233 (1975), a juror in a murder case, where the defendant was sentenced to life imprisonment, was found by the defense during jury deliberations to be the husband of the District Attorney's local chief secretary. Although there was no showing of prejudice to the defendant, the Oklahoma Court of Criminal Appeals reversed. It found that the jury was not impartial within the Constitutional guarantee where it included one man shown to be prejudiced within the definition of actual bias. As the Oklahoma court put it:

> While we are therefore left to speculate upon whether the defendant was prejudiced thereby, we recognize that the relationship itself approached being a basis for challenge for cause. In *Thompson, supra*, we held in part that a juror who was the brother of a deputy sheriff serving as a witness in chief for the State was subject to challenge for

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is not whether the jury result was influenced by the fact that the juror witness remained one of their number but whether his continued presence had the capacity of influencing the result of their deliberations, and the answer to that must be in the affirmative.

Only suspicion exists as to any influence upon the jury verdict. But, like Caesar's wife, a jury must remain free and untainted by even suspicion. While there is no proof that extraneous influence affected the jury verdict, there were circumstances to show that such a danger did exist.

No right is more fundamental to a defendant than a fair trial by jury, and the law is most sensitive to any infringement or impairment of that fundamental and constitutional right. It is the duty of this Court, when confronted with a record that discloses even a possible infringement of a defendant's right to a jury free and untainted by any suspicion of extraneous influences, to set aside a guilty verdict. For the reason that the verdict below must be set aside and a new trial granted to the defendant, it is not necessary for us to consider any other questions raised by this defendant.

353 A. 2d at 323-4.

> cause because of his close relationship with the deputy sheriff. Also, in *Scrivener* v. *State*, 63 Okl. Cr. 418, 75 P. 2d 1154 (1938), we held that all doubts regarding juror impartiality must be resolved in favor of the accused. In view of the foregoing, we are of the opinion that the defendant was effectively denied full enjoyment of his right to conduct *voir dire* examination of this venireman as a possible basis for challenge for cause, and deprived of information upon which to intelligently exercise a peremptory challenge against him.

541 P. 2d at 236. See also, *Carr* v. *State*, 84 P. 2d 42, 47 (1938), where the same court observed that

> . . . The impartiality of the jury goes to the very foundation of the accused's liberty, and where evidence is introduced such as is disclosed by this record of a convincing character to show that there is a strong probability that the accused was not accorded that fair and impartial trial guaranteed to him by the Constitution and laws of this state, and the rebuttal evidence is of a very unsatisfactory character, the verdict should be set aside and a new trial granted. It requires the unanimous consent of the jury to convict, and a fair and impartial jury is not had by 11 impartial men and one man shown to be prejudiced within the definition of actual bias.

United States v. *Kyle*, 469 F.2d 547 (D.C. Cir. 1972), *cert. den.*, 409 U.S. 1117, involved a situation where three of the jurors had been members of a jury in a prosecution of one Artis. The Artis jury had aquitted and was castigated by the trial judge. The prosecutor in *Kyle* knew of this but made no disclosure to the court. There was no showing of any prejudice to the defendant. While a majority of the court excused the prosecutor and affirmed, Judge Bazelon dissented vigorously. He wrote,

in pertinent part, in line with the enlightened view in *Woodard, supra*:

> A procrustean demand for a showing of prejudice is ill-suited to a case where the very integrity of the judicial process is at stake and where the inability to demonstrate prejudice offers little assurance that prejudice did not exist. Cf. R. Traynor, The Riddle of Harmless Error, 64-66 (1970).

Petitioner, as did the trial court, makes much of the fact that no one in the District Attorney's Office contacted Smith after it was learned that he was a juror in respondent's trial. Petitioner's Brief at 12, 15.* However, this course of conduct surely kept alive the hope in his mind that he was actively being considered for the position which accounts for both his call to Ms. Sudolnik on the day following the verdicts and his immediate subsequent request to his former supervisor to intercede for him through his contacts in the District Attorney's Office. It was only when, long after the conclusion of the trial, he learned from an attorney friend that he lacked the necessary experience for the position that, as petitioner concedes, "he abandoned hopes of being hired by the District Attorney." Petitioner's Brief at 12.

To claim that any person in Smith's position would not be influenced by his pending application is to fly in the face of all we know about human nature.** Further-

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* In fact, the chief trial prosecutor specifically instructed Ms. Sudolnik to make no response to Mr. Smith's application.

** One of the grounds advanced in defendants' successful motion to dismiss the indictments against them in *United States v. Daniel Ellsberg and Anthony J. Russo*, No. 9373-WMB-CD, C.D. Cal., was the fact that the presiding judge in that case had been offered "a proposed future assignment in government," [the directorship of the FBI] during the trial by the President at the San Clemente White House. Tr. 21, 333.

more, the acceptance of such a juror's fervent and repeated representations, see Petitioner's Brief at 12-13, given the circumstances here present, is to make credible the strenuous insistence of the fabled fox discovered inside the chicken coop that he meant no harm to its occupants. Clearly, the "possible temptation to the average man . . . not to hold the balance nice, clear and true between the state and the accused," *Tumey* v. *Ohio, supra* at 532, was here present and no amount of sophisticated discussion about state statutes dealing with juror standards or decisions dealing with fundamentally different fact situations can disguise that reality. By affirming the court below, this Court will be striking a heavy blow for fairness in criminal prosecutions.

B. The Smith Incident, Even If Not Considered To Have Actually Denied Respondent His Fifth And Sixth Amendment Rights, Violates The Appearance Of Justice Standard.

Recently, in *United States* v. *Brown*, 539 F.2d 467 (5th Cir. 1976), the conviction of H. Rap Brown, another controversial figure, was reversed because the trial judge's derogatory pretrial statement was held not to comport "with the appearance of justice." 539 F.2d at 470. The judge conducting the hearing on appellant Brown's motion to vacate his conviction and sentence, while finding that the derogatory remark had been made by the trial court, nevertheless denied the motion on the ground that "[U]pon a review of the record, he found that appellant had a fair trial." *Id.* at 469.

In unanimously reversing appellant's conviction, the Fifth Circuit, citing *In re Murchison*, 349 U.S. 133 (1955), *Knapp* v. *Kinsey*, 232 F.2d 458 (6th Cir. 1956), and *Rapp* v. *Von Dusen*, 350 F.2d 806 (3d Cir. 1965), held that "[T]he judge's statement did not comport with the appearance of justice, and it cannot be said from the

record alone that the appellant received a fair trial." * The same can certainly be said with reference to respondent, and Juror Smith's assurances that his pending application for employment did not influence him can be no more dispositive of the issue than was the statement by Brown's trial judge that "I would categorically deny that I would make such a statement." *Id.* at 468. As the Fifth Circuit pointed out, 28 U.S.C. § 455(a) now requires the mandatory disqualification of a federal judge "in any proceeding in which his[her] impartiality *might reasonably be questioned.* . ." *Id.* at 470. (emphasis in original). Can it logically be denied that Juror Smith's "impartiality might reasonably be questioned. . ."? The trial judge himself answered this question in the negative when he pointed out "the possible construction which might be placed upon [sending the application for employment]." App. E at 44a.

Additionally, as in *Brown*, it is impossible to know what effect Smith had on other jurors prior to or during deliberation. As stated by the *per curiam* court, "[T]he record does not reflect the tone of voice of the judge, his facial expressions, or his unspoken attitudes and mannerisms, all of which . . . might have adversely influenced the jury and affected its verdict." 539 F.2d at 469. Here, Smith, the only police-oriented juror, might well have had an influence on his fellow panel members far in excess of his single vote. With a jury that deliberated

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* See *United States* v. *Zannowitz*, 326 F. Supp. 90, 91 (C.D. Cal. 1971), where the court stated: "Like Caesar who parted from his wife Pompeia because she was not above suspicion, so here to avoid even the *appearance* of a *possibility* of personal bias or prejudice, wise discretion and sound judgment compel us to leave this case . . ." (emphasis in original). See also, *United States* v. *Quattrona*, 149 F. Supp. 240 (D. D.C. 1957) and *Mesarosh* v. *United States*, 352 U.S. 1, 14 (1956).

for eleven hours over two days in reaching its verdicts,* Smith, who could reasonably have been regarded as a police officer by his colleagues, may easily have tipped the scales against respondent, and there would be no record indication that such was the case.

Respondent was, of course, entitled to the verdicts of a jury whose integrity could not reasonably be questioned. In addition, he was entitled to a hung jury if the prosecution could not convince each juror of his guilt beyond a reasonable doubt on each and every charge. The presence of Juror Smith on his panel, if not "suspect" as a matter of law, clearly violated the "appearance of justice" standard as enunciated in *Brown* and *Rapp, supra.*

In an era when the fairness and equality of the criminal justice system are being questioned in many quarters, it behooves all courts to take any steps which might dispel such chronic and, in the eyes of many obsevers, justified mistrust.** The recent carnage and bloodshed in Miami and other cities should not be the

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* Despite the trial court's conclusion that the evidence against appellee was "overwhelming," App. E at 33a, the 10-2 for acquittal vote in the first trial, the length of the jury's deliberations at the second, the fact that most of the key witnesses against him were prostitutes or their patrons testifying four or more years after the commission of the crimes in question, the change in testimony of his wife after her estrangement from him, and the concession by the People during oral argument in the state courts that the introduction of immunized testimony spelled the differences between a 10-2 vote for acquittal and a conviction, argue to the contrary.

** In *Crawford* v. *United States, supra,* Mr. Justice Peckham emphasized that "[T]o maintain that system in the respect and affection of the citizens of this country it is requisite that the jurors chosen should not only in fact be fair and impartial, but that they should not occupy such relation to either side as to lead, on that account, to any doubt on that subject. 29 S. Ct. at 264.

touchstone of a civilized response to injustice, real or imagined. This case comes at an opportune time for this Court to insure that neither respondent, nor anyone else, should be forced to stand trial before a jury, one of whose members is actively seeking to be employed by the very office which is prosecuting him.

II

The Evidentiary Hearing Conducted By The State Court Should Not Be Controlling.

A. The Hearing Was, By The Nature Of Its Inquiry, Destined To Be Ineffectual.

Petitioner repeatedly argues that the holding by the state judge of a post-conviction evidentiary hearing satisfied the requirements of *Remmer* v. *United States*, 347 U.S. 227 (1954), with respect to post-verdict claims based on alleged juror bias.* Petitioner's Brief at 20, *et seq.* Respondent has already indicated, at some length, in Point I, *supra*, that, in view of the within circumstances, no hearing could possibly achieve anything vaguely approaching a probative result. A Remmer-type hearing only makes sense when, as in that case, there is something less involved than a juror's own affirmative misconduct and the strong probability that his admission that such misconduct affected his verdict would subject him to punitive measures, public scorn and/or the loss of an employment opportunity. In this connection, see *e.g.*, New York Penal Law (PL) § 195.05 (Obstructing Governmental Administration); § 215.50 (Criminal Con-

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* In *Remmer*, the issue was the effect of "[T]he sending of an FBI agent in the midst of a trial to investigate a juror" who had been contacted by an unnamed person who "remarked to him that he could profit by bringing in a verdict favorable to the petitioner [defendant]". 347 U.S. at 228-229.

tempt in the Second Degree); § 215.20 (Bribe Receiving by a Juror); and § 215.30 (Misconduct by a Juror), Appendix H.*

B. Prosecutional Misconduct.

However, there is an even more compelling reason why, in this case, the post-conviction hearing cannot be held to have dispelled the taint created by Juror Smith's application for a position with the prosecutor. It must constantly be kept in mind, as stressed by both the Court of Appeals majority, the District Court, and the state trial judge, that the prosecutors were guilty of (a) "the withholding . . . of information casting substantial doubt as to the impartiality of a juror," App. A at 10a, (b) the "inexcusable abridgement of [respondent's] Sixth Amendment right," App. B at 29a, and/or "questionable conduct" App. E at 52a, and "unique misjudgment," *Ibid.* at 57a.** Moreover, all of these courts emphasized that, had the prosecutors disclosed the information about Juror Smith's job application, which they had long before the case was submitted to the jury, he might have been easily replaced by one of four available alternates. The failure of the prosecutors to disclose the information they possessed about the Smith job application is doubly egregious in view of their willingness to reveal the fact that another juror was scheduled to be a witness for another prosecutorial office in an unrelated prosecution and to agree to his replacement by an alternate. App. E at 34a.

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* Significantly, after the post-verdict hearing conducted by the state court judge, the chief trial assistant revealed that Juror Smith had drug-related and family problems in 1970 or 1971, had spent some time in a Connecticut mental institution (Silver Hills) and had had problems with the police in New York City and Australia. Hearing Transcript at 893, 895-7.

** The state court judge also characterized the juror's conduct as "unprecedented imprudence", App. E at 57a and an "extraordinary development." *Ibid.* at 39a.

In short, the evidentiary hearing held by the trial court was made necessary, not by the routine post-conviction discovery of facts which might point to the possibility of a juror's bias, but by the wilful failure of the prosecutors to make timely disclosure of such information.* It is obvious, given the different approach adopted by them in the case of Juror Bethel, that they were more interested in retaining Smith on the jury which passed on respondent's guilt or innocence than Bethel. Accordingly, they made a calculated decision to reveal the latter's relationship as a potential prosecution witness with the Special Narcotics Prosecutor, which maintains its office separate and distinct from that of the District Attorney, while withholding what they had learned about Smith's job application. This is nothing short of prosecutorial misconduct of the most flagrant sort.

It is, perhaps, the tragic hallmark of our times that those guilty of such misconduct, no matter how wanton or gross, are almost never punished. In drafting this brief, counsel gave thought to what would have happened to the defense attorney had, following respondent's hypothetical acquittal, it been discovered that, during the trial, one of the jurors had secretly written to him to apply for a job in his office, and he had not disclosed that fact to the Court and the prosecutor. It does not take much imagination to realize that, in such a situation, there would have been enormous repercussions on both the criminal and disciplinary levels.

Yet, in the within case, demonstrable "questionable conduct" on the part of the prosecutors, is ingenuously excused by petitioner on the primary ground that the perpetrators "were preoccupied with preparing for the

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* "Here, the failure to hold a hearing [during the trial] resulted from a prosecutor's serious error in judgment." Petitioner's Brief at 31.

crucial stages of this important murder trial," Petitioner's Circuit Court Brief at 39, and were "caught up in the press of trial." *Id.* at 40. See also Petitioner's Brief at 31, fn. 11. Even the trial judge adopted the viewpoint that they had "permitted the pressures of the case to becloud their professional vision . . ." App. E at 52a. Counsel can well imagine how such an untenable excuse would fare if the shoe was on the other foot.

If all of these self-serving apologia were, in fact, true statements of why the prosecutors did not reveal the existence of Smith's application when it came to their attention, what prevented them from so doing after the summations and the charge but before the jury retired to begin its deliberations, when, presumably, they would be free of trial tensions? After all, there were at least three alternates still available and Smith could easily have been replaced. The long and the short of it is that, once having learned of Smith's application, they considered him to be a pro-prosecution juror and did not want to lose him in what all concerned considered to be an extremely close case. The District Court clearly understood the obvious motivation behind their failure to disclose *at any time* * Smith's pending application when it wrote:

> The assistant district attorneys who prosecuted these serious criminal charges in state court must share the responsibility for this inexcusable abridgement of the petitioner's Sixth Amendment right. They were aware of this problem long before the jury retired to deliberate and failed to bring this matter to the attention of the trial court or defense counsel. Since three alternate jurors were available at the time, this controversy could

* Significantly, it was their superior who eventually made the disclosures. App. A at 5a.

> likely have been avoided by the substitution of another juror for Smith.
>
> App. B of 29a.

As previously indicated, the Smith incident was not the first instance of juror disqualification to surface during respondent's trial. Although the prosecutors discovered three days after the presentation of evidence began that Juror No. 6, one Lawrence Bethel, had earlier agreed to cooperate with the Special Narcotics Prosecutor by testifying against the alleged seller of narcotics to him in exchange for the dismissal of misdemeanor charges against himself, they did not bring this fact to the trial court's attention until the completion of summations, more than a month and a half later. Following their belated disclosure, the parties all consented to Mr. Bethel's discharge and replacement by the first alternate.

Recently, in *United States* v. *Falk*, 605 F.2d 1005 (7th Cir. 1979), former Chief Judge Swygert, in commenting upon what he termed "flagrant . . . abuse . . ." by the prosecutor in his summation to the jury, 605 F.2d at 1015, stated, in dissenting from the majority's affirmance of an income tax conviction, as follows:

> Unfortunately flagrant abuses of professional standards, such as the foregoing, seem to be occurring more frequently in this circuit. I believe that the reasons include the fact that competitive and ambitious prosecutors (perhaps reflecting the ethos of the 1970's) think that to win by any means is the 'name of the game'. Further they are emboldened to flaunt the *Berger** admonition by the inaction of trial judges who fail to stop such improper advocacy conduct in its tracks and this court's bark—scoldings and warnings—with no bite.
>
> *Ibid.* at 1016.

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* *Berger* v. *United States*, 295 U.S. 78 (1935).

On two separate occasions in recent months, appellate courts in New Jersey have urged that state's Supreme Court to take steps to halt what they termed to be the "serious misconduct" of prosecutors during criminal trials. In *State* v. *Walsh*, Superior Court, Bergen County, the Appellate Division stated, on December 26, 1979, that while it did not find the misconduct in question "highly questionable" remarks during summation sufficient to merit reversal of appellant's conviction:

> We deplore conduct of any prosecutor that transcends the bounds of propriety. We censure the prosecuting attorney in this case although, in the circumstances, we find a reversal is not warranted. We cannot be sure that stern warnings and occasional reversals have been sufficient to control the problem.
>
> It may be time for our Supreme Court to consider disciplinary proceedings as a means of holding this conduct in check.

New York Times 12/27/79. The same court, barely more than a month later, in reversing a conviction because of another instance of a "particularly prejudicial" summation by a prosecutor, again implored the Supreme Court to take some action to bring such misconduct to an end. *New York Times*, 2/3/80.

The breakdown in official morality represented in *Falk* and *Ellsberg*, *supra*, and such recent cases as *United States* v. *Banks*, 383 F. Supp. 389 (D. S.D. 1974), *appeal dismissed* 513 F.2d 1329 (8th Cir. 1975), and *In re Grand Jury Investigation*, 610 F.2d 202 (5th Cir. 1980), to name but a few, is, to put it mildly, appalling. They seem to infect the jurisprudence of every state and federal district and reflect a frightening trend that, unless soon checked, may well undermine the social and political structure of the nation as a whole. If the law may be

perverted for some defendants, either because of the heinous nature of the crimes of which they stand accused, their pariah status, or their political or social views, then it will eventually be defaced for everyone.

What is perhaps the most disturbing aspect of this endemic misconduct is the public apathy toward it. An electorate that rarely, if ever, learns of any adequate condemnation of or punishment for such misdeeds inevitably builds up a tolerance for them. In such an atmosphere, the cancer spreads rapidly and what Circuit Judge Swygert sadly referred to in *Falk, supra*, as "the ethos of the 1970's" will surely taint succeeding decades unless our courts take affirmative action to clear the air. This case presents a significant opportunity for the cleansing process to begin.*

In New Jersey, an appellate court has recently pointed the way in this respect. In *State* v. *Thomas*, 168 N.J. Super. 10 (App. Div. 1979), which involved the conviction of appellant for armed robbery, atrocious assault and battery, and numerous other crimes, the court, in reversing, stated as follows:

> The evidence was clearly sufficient to support the verdict of guilty returned by the jury [n]evertheless, it is reluctantly concluded that the judgment of conviction must be reversed and the matter remanded for a new trial because of prosecutorial excesses and improprieties. Repeatedly expressing concern for prosecutorial misconduct, the Supreme Court has stated that, in appropriate cases, a mere expression of displeasure would not be a

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* Only days ago, a District Court set aside the convictions of a number of defendants accused of counterfeiting-tape charges on the primary ground of the prosecutor's "attempted cover-up of the false statements" given by a prosecution witness during trial. See *United States* v. *Sam Goody, Inc. et ano.*, CR 80-95 and CR 80-507 (EDNY, 7/27/81) Appendix M.

> sufficient remedy, and more severe action may be necessary.
>
> This is such a case; the conduct of the prosecutor induced errors of such magnitude and number, as to deprive defendant of a fair trial.

The Court of Appeals was, quite obviously, deeply concerned with not only the "harm . . . to the accused" caused by prosecutorial misconduct, but by that caused "to society as a whole" when this "appearance of justice" is destroyed. *Rose* v. *Mitchell*, 443 U.S. 545, 555-56 (1979). App. A at 10a. In affirming the judgment of the District Court, it emphasized this prophylactic approach when it stated:

> To condone the withholding by the prosecutor of information casting substantial doubt as to the impartiality of a juror, such as the fact that he has applied to the prosecutor for employment, would not be fair to a defendant and would ill serve to maintain public confidence in the integrity of the judicial process. We . . . hold that the prosecutor may not keep silent when he knows that a juror has applied to become his employee.*
>
> *Id.*

This Court should do no less.

III

The Implied Bias Of A Trial Juror In A State Criminal Case Is An Appropriate Subject For Federal Habeas Corpus Review.

Petitioner concedes, in discussing *Stone* v. *Powell*, 428 U.S. 465 (1976), that "unlike Fourth Amendment claims such as those at issue in *Stone*, claims involving alleged

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* See also *Taylor* v. *Lombard*, 606 F.2d (2d Cir. 1979).

juror bias in a state proceeding may be reviewed in federal habeas corpus proceedings." Petitioner's Brief at 30. However, he goes on to assert that "[N]onetheless, in habeas corpus review, federal courts must treat state hearings and the judges who hold them in the same manner and with the same respect offered *Remmer*-type hearings held by federal judges. *See* 28 U.S.C. 2254(d); *Sammer* v. *Mata*, — U.S. —, 101 S.Ct. 764, 770-71 (1981) (discussed at pp. 34-35, *infra*." *Id.*

Respondent has already indicated that, no matter how searching the state court hearing as to Juror Smith's partiality or impartiality may have been, the only possible proof, one way or the other, had to come from the juror himself. In this case, as noted by the Court of Appeals, "it is at best difficult and perhaps impossible to learn from a juror's own testimony after the verdict whether he was in fact 'impartial'." App. A at 7a. Accordingly, given the within facts and circumstances, this is not the type of "factual issue" which "can be presumed to be correct" under the provisions of 28 U.S.C. 2254(d).

It would seem that the standard established by this Court in *Rose* v. *Mitchell*, 443 U.S. 545 (1979) is the only one reasonably applicable to this case. The fact that a juror in a double murder trial (1) applied to the prosecutor for a position shortly after the taking of testimony had begun, (2) caused others to make inquiry of his application's progress during the trial, and (3) contacted the prosecutor's office with reference thereto the day after the verdicts, while the trial assistants withheld knowledge from the Court and the defense that such an application had been filed with their office, certainly is "odious in all respects, is especially pernicious in the administration of justice . . . [and] thereby casts doubt on the integrity of the judicial process." 443 U.S. at 55-6. See also *Peters* v. *Keff*, 407 U.S. 493, 506-07 (1972) (White, J. concurring).

In the last analysis, the Court is here confronted with a unique situation involving, as it does, the application by a trial juror for a job with the prosecutor, and the withholding of this information from both the court and the defense counsel by the latter. Not only is a Remmer-type hearing totally inappropriate, for the reasons previously given, but it would be difficult to imagine any rational disagreement with the proposition that a jury containing such a juror would "cast[s] doubt on the integrity of the judicial process." *Rose* v. *Mitchell, supra,* at 506-07. Simply stated, any jury containing someone in Mr. Smith's position cannot be held to comport with the requirements of the Sixth Amendment.

CONCLUSION

Unless this case is to be treated differently from any other one and the applicable law totally disregarded, respondent is patently entitled to a resounding affirmance of the judgment of the Court of Appeals and/or the District Court. Any other result would be an intolerable violation of his rights to due process, the equal protection of the law and to a fair and impartial jury, and serve to discredit the entire legal system and those who administer it.

As Chief Justice Burger stated in *TVA* v. *Hill,* 437 U.S. 153, 195 (1978):

> The lines ascribed to Sir Thomas Moore by Robert Bolt are not without relevance here:
>
> > The law, Roper, the law. I know what's legal . . . I'm *not* God. The currents and eddier of right and wrong, which you find such plain-sailing, I can't navigate, I'm no voyager. But in the thickets of the law, oh there I'm a forester . . . what would you do? Cut a great road through the law to get after the Devil? . . .

> And when the last law was down, and the Devil turned round on you—where would you hide, Roper, the laws all being flat? . . . This country's planted thick with laws from coast to coast—man's laws, not God's—and if you cut them down . . . d'you really think you could stand upright in the winds that would blow then? Yes, I'd give the Devil benefit of the law, for my own safety's sake. R. Bolt, A Man For All Seasons, Act 1, p. 147 (Three Plays, Heinemann, ed. 1967).

WHEREFORE, it is respectfully prayed that the judgment of the courts below be affirmed.

Dated: New York, N.Y.
August 3, 1981

Respectfully submitted,

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* Counsel wish to express their appreciation to legal worker Jane B. Ransom, and law student Ronald Brown, for their invaluable assistance in the preparation of this brief.

APPENDIX

Appendix H (Penal Law)

§ 195.05 OBSTRUCTING GOVERNMENTAL ADMINISTRATION

A person is guilty of obstructing governmental administration when he intentionally obstructs, impairs or perverts the administration of law or other governmental function or prevents or attempts to prevent a public servant from performing an official function, by means of intimidation, physical force or interference, or by means of any independently unlawful act.

Obstructing governmental administration is a class A misdemeanor.

L.1965, c. 1030.

§ 215.20 BRIBE RECEIVING BY A JUROR

A juror is guilty of bribe receiving by a juror when he solicits, accepts or agrees to accept any benefit from another person upon an agreement or understanding that his vote, opinion, judgment, decision or other action as a juror will thereby be influenced.

Bribe receiving by a juror is a class D felony.

§ 215.30 MISCONDUCT BY A JUROR

A juror is guilty of misconduct by a juror when, in relation to an action or proceeding pending or about to be bought before him, he agrees to give a vote, opinion, judgment, decision or report for or against any party to such action or proceeding.

Misconduct by a juror is a class A misdemeanor.

L.1965, c. 1030.

§ 215.50 CRIMINAL CONTEMPT IN THE SECOND DEGREE

A person is guilty of criminal contempt in the second degree when he engages in any of the following conduct:

Appendix H (Penal Law)

1. Disorderly, contemptuous, or insolvent behavior, committed during the sitting of a court, in its immediate view and presence and directly tending to interrupt its proceedings or to impair the respect due to its authority; or

2. Breach of the peace, noise, or other disturbance, directly tending to interrupt a court's proceedings; or

3. Intentional disobedience or resistance to the lawful process or other mandate of a court except in cases involving or growing out of labor disputes as defined by subdivision two of section seven hundred fifty-three-a of the judiciary law; or

4. Contumacious and unlawful refusal to be sworn as a witness in any court proceeding or, after being sworn, to answer any legal and proper interrogatory; or

5. Knowingly publishing a false or grossly inaccurate report of a court's proceeding; or

6. Intentional failure to obey any mandate, process or notice, issued pursuant to articles sixteen, seventeen, eighteen, or eighteen-a of the judiciary law,[1] or to rules adopted pursuant to any such statute or to any special statute establishing commissioners of jurors and prescribing their duties or who refuses to be sworn as provided therein; or

7. On or along a public street or sidewalk within a radius of two hundred feet of any building established as a courthouse, he calls aloud, shouts, holds or displays placards or signs containing written or printed matter, concerning the conduct of a trial being held in such courthouse or the

character of the court or jury engaged in such trial or calling for or demanding any specified action or determination by such court or jury in connection with such trial.

Criminal contempt in the second degree is a class A misdemeanor.

Appendix I

Excerpt from *The New York Times*, November 22, 1976, Page 22, Column 4

Jury Convicts Phillips on 2 Brothel Murders in 1968

By Alfred L. Clark

The jury had deliberated for 11 hours over a two-day period. . . .

• • • • •

Mr. Phillips was first tried on the murder indictment in the summer of 1972. That trial ended in a mistrial with the jury reportedly 10 to 2 for acquittal.

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Appendix J

Excerpt from the *New York Daily News*, November 22, 1976, Page 5, Col. 1

Phillips Guilty of Murdering Pimp & Prostitute

By D. J. Saunders

* * * * *

An all-male jury returned the verdict in Manhattan Supreme Court before Justice Harold Birns at 3:57 p.m. after almost 11 hours of deliberation over two days.

* * * * *

* * * At Phillips' first trial for the double slaying—which ended with a hung jury—the jury also had asked for Gonzalez' testimony to be reread. The jury reportedly had voted 10 to 2 for acquittal.

* * * * *

Appendix K (Affidavit of Michael F. Armstrong)

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

MICHAEL F. ARMSTRONG, being duly sworn, deposes and says:

1. I am an attorney duly admitted to the practice of law in the State of New York and a member of the firm of Barrett Smith Schapiro Simon & Armstrong, 26 Broadway, New York, New York 10004.

2. From July 1970 through December 1972, I served as Chief Counsel for the Commission to Investigate Allegations of Police Corruption and New York City's Anti-Corruption Procedures, a citizens' commission charged with the task of investigating police corruption in the New York City Police Department. The Commission, known as the "Knapp Commission" after its chairman, Whitman Knapp, was created by Mayor John Lindsay's Executive Order No. 11, dated May 21, 1970 (attached hereto as Exhibit 1) and City Council Local Law No. 13, enacted May 27, 1970 (attached hereto as Exhibit 2). The Mayor acted in response to a letter, dated May 14, 1970, from a committee headed by Corporation Counsel J. Lee Rankin, which had been appointed to look into specific charges of police corruption made in the public press (a copy of this letter is attached as Exhibit 3).

3. In or about May 1971, Commission agents conducted an investigation of police corruption on the East Side of Manhattan, which led to officer William R. Phillips. Mr. Phillips, a patrolman assigned to the 25th Precinct in upper East Side Manhattan, was observed, recorded and photographed in the commission of several corrupt acts involving accepting money from an East Side prostitute.

4. When confronted with the evidence of his actions, Mr. Phillips agreed to give the Commission information

about police corruption and to work as an undercover agent. He made this agreement on the condition that he would be afforded immunity for matters which he described to the Commission.

5. The Commission did not have the power to grant immunity. Therefore, I requested Whitney North Seymour, Jr., the United States Attorney for the Southern District of New York, to agree that if Mr. Phillips' work resulted in substantial federal indictments of either organized crime figures or corrupt police officers, he would be granted immunity and Mr. Seymour would see to it that such immunity was honored by state authorities. Mr. Seymour agreed, and authorized me so to inform Mr. Phillips.

6. Pursuant to this agreement, Mr. Phillips worked as an undercover agent for the Commission for approximately five months. He participated in a total of 69 operations in which tape recorded conversations involving corruption were obtained. As of the time of the submission of the Commission report to the Mayor on December 26, 1972, Mr. Phillips' efforts had resulted in indictments of 31 individuals. Six federal and six New York County indictments named a total of 17 police officers and 14 other persons, most of whom were organized crime members. Many more indictments were anticipated as a result of Mr. Phillips' work, but his own indictment, on March 20, 1972, on charges of murder and attempted murder aborted most of these efforts.

7. During the summer of 1971, I recorded a conversation with Mr. Phillips, during which he recounted many of his experiences during his police career. He described in detail many instances of corruption, including his experience with a Jimmy Smith, who was a pimp and gambler operating on the East Side. This tape recording was made in order to demonstrate to the

commissioners the type of information to which Mr. Phillips could testify at a public hearing.

8. In other interviews with me and members of my staff, Mr. Phillips told us other details about corrupt dealings with Mr. Smith.

9. In his public testimony before the Knapp Commission, for which I prepared Mr. Phillips, he testified about an incident involving Mr. Smith. As with other such testimony, no names were used and the events were described in general terms.

10. In early 1972, it was revealed that Mr. Phillips was under investigation for the 1968 murder of Mr. Smith and one other person, and the attempted murder of a third person. He was subsequently indicted on March 20, 1972. During the course of the investigation of this matter, the Commission staff responded to all inquiries made by the District Attorney's office and made its files available to the investigators looking into the case. Police officers from the Internal Affairs Division had open access to Commission files. The Commission also made available tape recordings taken during the course of this investigation, including the tape recorded interview with Mr. Phillips referred to in paragraph 7 above.

11. It was my clear and unequivocal understanding that William Phillips, in return for his successful efforts in developing criminal cases against corrupt police officers and organized crime figures, would receive full and complete transactional immunity for all matters about which he gave information. I have spoken to Whitney North Seymour, Jr., Esq., formerly United States Attorney for the Southern District of New York, and he has no recollection contradictory to mine.

12. I am informed that the tape recorded interview of Mr. Phillips was used by the prosecution against him

at his trial. It is also clear that the information provided to the prosecutors by the Commission regarding Mr. Phillips' admitted contacts with Mr. Smith afforded leads which were followed up by detectives investigating the case and ultimately resulted in evidence used against Mr. Phillips. The detective who re-opened the investigation has stated that he did so on the basis of information obtained from Mr. Phillips' public testimony before the Knapp Commission.

/s/ MICHAEL F. ARMSTRONG
MICHAEL F. ARMSTRONG

Sworn to before me this
27th day of April, 1978.

/s/ JOAN FARRELL

Joan Farrell
Notary Public, State of New York
No. 03-4521830
Qualified in Bronx County
Certificate Filed in New York County
Commission Expires March 23, 1980

Appendix L (Opinion Delivered July 13, 1981)

SUPREME COURT OF ARKANSAS

No. 81-10

Appeal from Madison Circuit Court;
Paul Jamieson, Judge.

MOODY EQUIPMENT & SUPPLY COMPANY,
Appellant,

v.

UNION NATIONAL BANK, Administrator, et al.,
Appellees.

GEORGE ROSE SMITH, Associate Justice

GEORGE ROSE SMITH, J. In this action for the wrongful death of William Dale Pryor, brought by the appellee bank as administrator, the jury's verdict was for the defendant, Moody Equipment & Supply Company. The trial judge, however, granted the plaintiff's motion for a new trial for misconduct of a witness for the defendant. ARCP, Rule 59 (a). For reversal Moody argues that it was entitled to a directed verdict and that the trial court abused its discretion in granting a new trial. The case falls within our jurisdiction under Rule 29 (1) (o).

The complaint, among other allegations, asserted that Moody was strictly liable for having sold a used crane that was so defective as to make it unreasonably dangerous. Ark. Stat. Ann. § 85-2-318.2 (Supp. 1979). At the time of the accident the decedent, an employee of the general contractor on a building construction job, was loading plywood onto a harness so that it could be lifted by the crane. The crane's boom was extended over a high voltage line. The plaintiff's proof indicated that the piston cups in the crane's hydraulic system were so worn by long use that the fluid bled out. The resulting

loss of compression caused the crane's boom to inch downward about four feet and touch the power line, electrocuting Pryor.

Moody does not seriously deny that it was at fault in selling the crane without having inspected the piston cups, but it argues that its negligence was superseded by various intervening causes, such as the contractor's failure to have the power line de-energized, the omission of several safety measures required by Ark. Stat. Ann. §§ 81-1405 and -1406 (Repl. 1976), and the crane operator's failure to discontinue its use after the boom had unaccountably descended earlier on the same day. The jury, however, could have found from the evidence that the possibility of such occurrences was reasonably foreseable in the ordinary course of the crane's intended use in construction work, so that the later acts of negligence by third persons became merely concurrent, not superseding, causes of Pryor's death. See *Franco* v. *Bunyard*, 261 Ark. 144, 547 S.W. 2d 91 (1977), cert. den. 434 U.S. 835 (1977); *Hartsock* v. *Forsgren*, 236 Ark. 167, 365 S.W. 2d 117 (1963). Hence Moody was not entitled to a directed verdict.

Second, near the end of the trial the plaintiff moved for a mistrial on the ground that two of Moody's witnesses, Jordan and Andrews, had been seen in conversation with jurors. The court at once conducted a hearing in chambers, but nothing of a seriously prejudicial nature developed. In particular, Andrews testified only that he had talked with one juror about having been in the military service and had recommended a Little Rock hotel to another juror. The court did not make a ruling, because at the close of the in-chambers hearing the plaintiff withdrew its motion for a mistrial.

After the verdict, however, the plaintiff raised the point again in a motion for a new trial. This time the proof developed misconduct not touched upon at the in-

chambers hearing and not then brought to the attention of the plaintiff's attorney. A witness testified that during a recess a female juror had mentioned Andrews' blue eyes to him in a "downright flirty" manner. Another witness testified that he heard Andrews ask a juror (presumably the same one) where she lived and if it would be all right if "they" came to see her sometime; she said she'd be glad if they did. Andrews admitted that the juror told him he had pretty blue eyes, but he denied the rest. The trial judge evidently accepted the other testimony, which would indicate that Andrews had not been completely candid at the in-chambers hearing during the trial.

To reverse the judgment we would have to say that the trial judge abused his discretion in granting the motion for a new trial. It is fundamental, however, that the latitude of the trial judge's discretion increases proportionately as the situation presents to him a question that cannot equally well be presented to us by the printed record. For instance, we seldom reverse the trial judge's decision to grant a new trial on the ground that the jury's verdict was in his opinion contrary to the preponderance of the testimony. See *Smith* v. *Villarreal*, 253 Ark. 482, 486 S.W. 2d 671 (1972). There he has the unique advantage of having heard the testimony at first-hand. Again, we have deferred scores of times to the trial judge's ruling upon a motion for a continuance. There he knows, for instance, as we cannot know, the propensity of a certain lawyer to seek a continuance in every case, or a docket condition that justifies a delay only for the strongest of reasons, or other matters not to be found in the printed record.

This case properly falls in the same category with respect to the trial judge's discretion. This trial judge had heard all the testimony and was in a position far superior to ours to know whether the proof was so nearly

balanced that the misconduct of a witness and juror might have tipped the scales one way or the other. The trial judge had the advantage of having observed the witness Andrews at the in-chambers hearing, when the witness was understandably apologetic about having spoken to jurors at all. The trial judge was of course familiar with the courthouse in which the case was tried and knew to what extent its adequacy or deficiencies might or might not have brought witnesses and jurors into unavoidable contact with one another during recesses. In a situation such as the one presented by this case, it is not our place to set aside the trial judge's decision unless we can say with confidence that his discretion was markedly abused. Here we cannot make that statement.

Affirmed.

Adkisson, C.J., and Purtle, J., dissent.

Appendix M

Excerpt from *The New York Times*, July 28, 1981, Page 1, Column 2

Convictions Thrown Out in Sam Goody Tape Case

By Joseph P. Fried

A Federal judge yesterday threw out the convictions of Sam Goody Inc. and a vice president of the company on counterfeit-tape charges and accused the prosecution of misconduct.

The judge, Thomas C. Platt of Federal District Court in Brooklyn, presided last spring at the five-week trial involving the company, one of the oldest and largest chains of recorded-music stores in the United States.

The trial had followed a yearlong undercover investigation by the Justice Department into what officials called widespread operations that illicitly duplicated cassettes and eight-track tapes of popular music as well as their original labels and packaging.

In throwing out the convictions and ordering a new trial for the company and its vice president, Samuel Stolon, the judge held that the jury's deliberations at the original trial might have been "tainted" by various conditions.

One of these, he said, was the prosecutor's "attempted cover-up of the false statements" given by a Federal Bureau of Investigation agent who was a prosecution witness during the trial.

"Only after the court, in effect, directed the Government to do so did it correct the false testimony," Judge Platt said yesterday. "By that time, many days after the false testimony had been given, much, if not all, of the significance of the falsity of the testimony may well have escaped the jury."

Appendix M

The judge was referring to two appearances before the jury by the agent, Richard Ferri. In his original appearance, Mr. Ferri indicated certain key notes he had taken at meetings with Government informants had been lost or destroyed. In his second appearance, he said that the notes had not, in fact, been lost or destroyed because he had not taken them to begin with. Mr. Ferri added that his original testimony had been the result of faulty recollection.

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